STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2001
v	No. 216871 Genesee Circuit Court
AUDREE BERNARD DAVIS, Defendant-Appellant.	LC No. 98-002411-FH

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1). The trial court sentenced him as a third felony offender, MCL 769.11; MSA 28.1083, to two consecutive terms of 2 to 40 years' imprisonment. We affirm.

This case arises out of a controlled drug purchase that occurred on January 27, 1998 in the city of Flint. Defendant first argues that the trial court lacked jurisdiction to preside over this case because Officer Ralph Tedford of the Flint Police Department gave false testimony to the magistrate on May 8 or 18, 1998[1] to support the issuance of the arrest warrant in this case. Defendant did not raise this issue at any time during the lower court proceedings. Accordingly, this issue is not properly preserved for appeal. In order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show: 1) that an error occurred; 2) "that the error was plain, i.e., clear or obvious"; and 3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This test applies to unpreserved allegations of both constitutional and nonconstitutional error. *Id.* at 764. Once an appellant has satisfied these three requirements, an appellate court must "exercise its discretion in deciding whether to reverse." *Id.* at 763. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 774.

[1] Defendant cites two different dates in his appellate brief and has not provided this Court with a copy of the hearing transcript.

Defendant contends that Officer Tedford went before a magistrate on May 8 or 18, 1998 in order to obtain an arrest warrant for defendant relating to a controlled drug purchase that occurred on March 11, 1998. Defendant argues that Officer Tedford's testimony during the May hearing was false because it was inconsistent with his trial testimony. Therefore, defendant contends that the arrest warrant issued by the magistrate was invalid and defendant's conviction must be reversed because the trial court lacked jurisdiction. However, Officer Tedford's testimony at the May hearing apparently related to different charges against defendant than those for which defendant was tried and convicted in this case. Indeed, the felony complaint and warrant for the instant case, relating to a controlled drug purchase that occurred on January 27, 1998, was issued on March 25, 1998, before the May hearing about which defendant complains even occurred. Subsequently, Officer Tedford and the other prosecution witnesses gave testimony at a preliminary examination and at trial relating only to the controlled drug purchase that occurred on January 27, 1998. Accordingly, we find no plain error mandating reversal.

Furthermore, we note that the circuit court acquired jurisdiction over the criminal prosecution of defendant through the preliminary examination, see *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 119; 215 NW2d 145 (1974), and defendant does not argue that Officer Tedford, or any other prosecution witness, gave false testimony at the preliminary examination in this case. Defendant's argument that the trial court lacked jurisdiction over defendant is without merit.

Defendant next argues that the trial court improperly allowed the admission of testimony that defendant made threatening remarks to a witness. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

The confidential informant in this case testified at trial that defendant threatened him in the summer of 1998, several months after the controlled drug purchase at issue had taken place, and told him to call defendant's attorney and say that his earlier statements against defendant were false. Defendant claims that the trial court improperly admitted this testimony because its probative value was substantially outweighed by its prejudicial effect. We disagree.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

This Court has specifically held that "evidence that a defendant is threatening people in order to prevent his prosecution is properly admissible" under MRE 404(b). *People v Abernathy*, 153 Mich App 567, 573; 396 NW2d 436 (1985). Similarly, in *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851(1996), our Supreme Court opined:

> A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt.
>
> As the circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case. [Citations and footnote omitted.]

The informant's testimony indicated that defendant threatened him in the summer of 1998 in an attempt to avoid prosecution for the delivery of crack cocaine that occurred on January 27, 1998. The trial court stated that it based its decision to admit the testimony on this Court's holding in *Abernathy, supra,* and the Supreme Court's holding in *Sholl, supra*. We find that the trial court's decision was not an abuse of discretion. The plain language of *Abernathy, supra,* and *Sholl, supra,* supports the trial court's finding that the informant's testimony regarding defendant's threat was admissible, and the probative value of the testimony was not substantially outweighed by its prejudicial effect.

Moreover, because the testimony regarding the threat was admissible, we reject defendant's argument that the prosecutor committed misconduct requiring reversal by seeking its admission.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter